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IN THE

Supreme Court of the United States

Docket No. 76-464

GERALD SHREIBER and STANLEY WEISS,

Petitioners,

vs.

UNITED INDUSTRIAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK—APPELLATE DIVISION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioners seek a writ of certiorari to the Supreme Court, Appellate Division, First Department, of the State of New York, an intermediate appellate Court of that State (1).*

The Court of Appeals of New York, the highest appellate Court of that state, dismissed the petitioners' motion for leave to appeal to that Court, on the ground that "the order sought to be appealed from does not finally deter-

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* Numbers in parentheses refer to pages of the Petition.

mine the action within the meaning of the Constitution and involves the exercise of discretion of a type not reviewable by the Court of Appeals (9a-10a).

Petitioners were the defendants in the New York action. After their default, the judgment against the Petitioners was entered pursuant to findings of fact and conclusions of law made by the trial Judge, after a hearing and according to the evidence submitted (3a-5a). The judgment was entered approximately 5 years ago and was based upon the defendants' "fraud and misrepresentation" (3a-4a). The judgment was in accordance with the Notice endorsed upon the summons personally served upon the defendants (4-5) and was limited to the amount therein specified, although the plaintiff's actual damage was in excess thereof (8a-9a).

Jurisdiction

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. 1257(3). They seek a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review its Order and Decision entered on February 2, 1976.

At the outset it should be noted that the Petition is not timely filed within the purview of 28 U.S.C. 2101(c) and should be dismissed on that ground.

Further, the Petitioners, approximately 5 years after the judgment of the trial Court was entered, attempt to raise for the first time a question under the due process clause of the Fourteenth Amendment of the Constitution of the United States. Obviously the Courts below did not pass upon this question since it was never raised or preserved in any state court. This Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. Consequently, the writ should be dismissed on this second ground [*Cardinale* v. *Louisiana*, 394 U.S. 437, 89 S. Ct.

1161, 22 L. Ed. 2d 398 (1969); *Tacon* v. *Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 346 (1973)].

Question Presented

Under the indisputable facts of this case, was the due process clause of the Fourteenth Amendment of the Constitution of the United States violated? More specifically, as stated by the Petitioners:

> "Does Section 3215(f)(i) of the Civil Practice Law and Rules of the State of New York violate the due process clause of the Fourteenth Amendment to the United States Constitution when it does not require prior notice to Petitioners of an assessment of damages hearing held pursuant to the entry of a default judgment against Petitioners." (3)

Restatement of the Case

Petitioners' statement of the case (4-6) is divorced from the record and is inaccurate in a number of material respects. The indisputable facts are recited *infra*.

The Petitioners were personally served with a Summons with "Notice" in New York on May 6, 1971 (4). The Notice read as follows (2a):

> "Notice: The object of this action is recovery of damages suffered by defendants' fraud, misrepresentation, deceit, breach of contract and malfeasance.
>
> The relief sought is the sum of $250,000.00.
>
> Upon your failure to appear, judgment will be taken against you by default for the sum of $250,000.00 with interest from April 30, 1971 and the costs of this action."

The Petitioners were thus apprised of the specific consequences of their failure to appear in the action. They then retained counsel who, without any objection whatsoever to service of the summons, discussed the matter with opposing counsel and requested an extension of time to appear. This request was fully granted, and an executed stipulation extending the defendants' time to appear or answer was transmitted to their counsel (5). No appearance was ever made on behalf of the defendants (7) and no further communication of any kind was ever received from them or from their counsel (i.e., until they moved to open their default approximately one year after the judgment against them was entered).

In due course, an inquest and an assessment of damages was held pursuant to the provisions of Section 3215(a) of the Civil Practice Law and Rules of the State of New York (14a). The trial Court made findings of fact and conclusions of law based upon the evidence submitted, and judgment was entered pursuant to said findings, except that the plaintiff's recovery was limited to the $250,000.00 specified in the Notice on the summons, although the plaintiff's actual damages were $252,299.00 (3a-5a; 8a-9a).

At no time during the entire history of the New York action did the defendants therein address themselves to the issue of a meritorious defense to the action (13a).

Reasons for Denying the Petition

Petitioners specifically claim:

1. That the default judgment was based "upon a summons which does not set forth adequate notice of the basis of the alleged cause of action against them" (3). It is respectfully submitted that even a cursory examination of the Notice on the summons (set forth above) reveals that the nature of the plaintiff's claim and the judgment to be

entered in the event of the defendant's failure to appear, were made abundantly clear.

This Court, in *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314-315, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950), has defined the quality of the notice required by procedural due process as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

Measured by the standards established by *Mullane, supra,* the Notice endorsed upon the summons personally served upon the defendants gave them reasonable and adequate notice of the nature of the plaintiffs' claim and of the consequences of their failure to appear. The constitutional requirements of due process were thus fully satisfied.

2. The petitioners' second claim is that Section 3215(f)(i) of the Civil Practice Law and Rules of New York violates the due process clause of the Fourteenth Amendment "when it does not require prior notice to Petitioners of an assessment of damages herein held pursuant to the entry of a default judgment against Petitioners" (3).

Section 3215(f)2 of the New York Civil Practice Law and Rules provides (16a):

> "Where an application for judgment must be made to the Court, the defendant who has failed to appear

> may serve on the plaintiff at any time before the motion for judgment is heard a written demand for notice of any reference or assessment by a jury which may be granted on the motion. Such a demand does not constitute an appearance in the action. Thereupon at least five days' notice of the time and place of the reference or assessment by a jury shall be given to the defendant by service on the person whose name is subscribed to the demand, in the manner prescribed for service of papers generally."

In the instant case, because plaintiff's claim was for unliquidated damages, application had to be made, and was made, to the Court, and the Petitioners could have had notice of the hearing for the assessment of damages if they had filed the demand specified in the quoted statute. Due process under the provisions of the Fourteenth Amendment does not require a hearing. All that is required is a notice and an opportunity to be heard—an opportunity which was afforded the Petitioners by the subject New York statute (*Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 2000, 32 L. Ed. 2d 556). Petitioners failed to file the statutory demand, and their failure to take advantage of the opportunity afforded them by Section 3215 did not result in lack of due process. The result was a waiver by the defendants of an opportunity to be heard.

However, assuming *arguendo* that Section 3215 of the New York Civil Practice Law and Rules did not afford the defendants an opportunity to be heard after their default in appearance on the issue of damages, the requirements of due process were nevertheless met because due process does not require such a notice [*Owens* v. *I.F.P. Corporation*, 374 F. Supp. 1032 (W. D. Ky. 1974), aff'd 419 U.S. 807, 95 S. Ct. 23, 42 L. Ed. 36 (1974)]. Petitioners have failed to cite a single case to the contrary. The cases cited by the Petitioners are all patently inapposite.

Conclusion

The Petition should be dismissed because it is untimely.

The Petition should be dismissed because it raises, or attempts to raise, a constitutional question never raised or preserved before. The Court of Appeals of New York was thus deprived of the first opportunity to consider the constitutionality of Section 3215 of the New York Civil Practice Laws and Rules. Matters such as these are among the most basic legislative concerns of each state, and considerations of federalism and comity require this Court to refrain from intruding in any way or from interfering with the procedures of the Courts of the State of New York.

The Petition should be denied because all the requirements of due process under the provisions of the Fourteenth Amendment of the Constitution of the United States were fully satisfied in the instant case.

Respectfully submitted,

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